

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Carey Jackson,

Petitioner,

CV-97-0381 (CPS)

- against -

MEMORANDUM
AND ORDER

United States of America,

Respondent.

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SIFTON, Chief Judge

Petitioner pro se Carey Jackson brings this petition pursuant to 42 U.S.C. § 2255 challenging his conviction for conspiring to defraud a United States agency by submitting or causing to be submitted false claims for Medicare payments in violation of 18 U.S.C. § 286. Although the government has submitted opposition papers, petitioner moves for a default judgment in his favor. For the reasons stated below, the petition is denied. Petitioner's motion for a default judgment is also denied.

BACKGROUND

The following facts were established at petitioner's trial. Medicare provides health insurance for those over 65. Medicare pays for durable medical equipment if prescribed by a doctor as medically necessary. A doctor can prescribe such equipment by filling out a certificate of medical necessity, setting forth the beneficiary's diagnosis and the duration of the

need for the equipment. A beneficiary or the doctor can take the certificate of medical necessity to a supplier who provides the equipment to the beneficiary within a day or two.

After delivering the equipment, the supplier requests payment of 20% of the cost of the equipment from the beneficiary. The supplier request payment of 80% of the cost from Medicare by sending a claims form and the certificate of medical necessity to the designated private insurers. Medicare hires these private insurers to review the claims and make payments to the providers pursuant to Medicare's guidelines. If the supplier determines that the beneficiary is unable to pay the 20% share due to financial hardship, the supplier can waive the beneficiary's co-payment.

Petitioner, as a representative of a company called Wellness at Home, contacted administrators at various apartment homes for low income seniors including New Community Commons, New Community Associates, New Community Manor, and James White Manor in Newark, New Jersey. Petitioner would arrange health fairs at which the residents discussed nutrition, had their blood pressure and blood sugar levels tested, and examined various types of equipment which they were told they could get for free. Also at the health fairs, the residents were asked what ailments they suffered and for their Medicare numbers.

After the health fairs, residents began receiving medical equipment they did not need. Some of the residents ordered the equipment at the fairs but others received the

equipment unsolicited. Other residents discovered that Medicare had paid for equipment for them that they did not need or receive. The residents were not billed by the suppliers of the equipment for the 20% normally to be paid by the recipient of the equipment. Certificates of medical necessity related to the equipment stated that the residents had medical conditions they did not have and referred to events that had not occurred such as emergency office visits and a trial period during which the equipment was tested. The diagnosis found on the certificates was substantially identical for each beneficiary prescribed a given type of equipment. The certificates indicated that two suppliers, Orthotics Fitters and Shivas, provided the equipment and requested payment for the equipment from Medicare. The certificates were signed by Dr. Nokuzola Ntshona, an obstetrician and gynecologist, who had not examined any of the residents.

After the residents began receiving the equipment, an administrator for the New Community buildings, Joyce Cook, contacted petitioner to tell him that equipment was being delivered without explanation and that the equipment should have been authorized by a doctor. Petitioner responded inaccurately that a doctor had authorized the equipment.

Special Agents James Langtry and Jaysen Eisengrien of the Federal Bureau of Investigation and the Department of Health and Human Resources, respectively, investigated petitioner's activities. The agents discovered that petitioner and his brother submitted numerous certificates of medical necessity

signed by Dr. Ntshona for durable medical equipment to Orthotics Fitters and Shivas. For each certificate, petitioner received a commission from the suppliers. Orthotics Fitters and Shivas then submitted a claim to Medicare for the cost of the equipment.

On October 20, 1994, Agent Langtry arrested and then interviewed petitioner. Petitioner stated that he was a salesman of durable medical equipment and that he worked for Orthotics Fitters and Shivas. Petitioner stated that he conducted health fairs with his brother and mother and collected information from the residents. Petitioner then would fill out certificates of medical necessity and would pay Dr. Ntshona to sign them. Petitioner knew that Dr. Ntshona did not always examine the individual named in the certificate. Petitioner submitted the completed certificate of medical necessity to the suppliers along with orders for the equipment to which the certificate related.

On February 13, 1995, Agent Langtry searched the basement of petitioner's apartment building finding items of durable medical equipment and certificates of medical necessity with the diagnosis filled out but without the names or Medicare numbers of the beneficiaries. The certificates for each type of equipment were identical, i.e., each certificate stating that a beneficiary needed a given type of equipment gave the same diagnosis. Some of the certificates had Dr. Ntshona's signature already on them. Also in the basement was a piece of paper with five signatures that appeared to be an attempt by someone to copy Dr. Ntshona's signature.

On June 6, 1995, petitioner and his brother were convicted of conspiring to defraud a United States agency by submitting or causing to be submitted false claims for Medicare payments in violation of 18 U.S.C. § 286. On October 31, 1995, petitioner was sentenced to 33 months imprisonment followed by two years of supervised release. Petitioner's conviction was upheld on appeal.

On January 23, 1997, petitioner filed a petition under 42 U.S.C. § 2255 challenging his conviction. Attached to the petition is a January 6, 1997 affidavit from petitioner. In his affidavit, petitioner states that he has revoked and rescinded his signature on all documents, is not a citizen of the United States even though he was born within the United States, and is not subject to the jurisdiction of the United States.

DISCUSSION

Under 28 U.S.C. § 2255, a federal prisoner may move the court which incarcerated him to "vacate, set aside, or correct" a sentence which was "imposed in violation of the laws or constitution of the United States." Construing Jackson's petition liberally pursuant to *Haines v. Kerner*, 404 U.S. 519 (1972), petitioner raises four challenges to his conviction. Petitioner argues that this court lacked jurisdiction to prosecute him, that he was denied due process and equal protection of the laws, that there was insufficient evidence to prove that he knowingly and intentionally conspired to defraud

the government, and that this court improperly admitted unduly prejudicial documentary evidence.

Lack of Jurisdiction

Petitioner argues that the federal government is one of limited powers vis á via the states. Petitioner argues that unless specifically provided for, the federal government has no jurisdiction over matters, like his crime, which occur within the boundaries of a state and over people, like him, who were born within a state. Petitioner further argues that he was not prosecuted under any of the three permissible areas of federal law - equity, common, or maritime law - but was impermissibly prosecuted under the Uniform Commercial Code.

Petitioner's argument is meritless. He was not prosecuted under the Uniform Commercial Code but under 18 U.S.C. § 286 which permits prosecution of:

[w]hoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim.

Contrary to petitioner's assertion, Congress may constitutionally pass statutes criminalizing frauds against the United States. See, e.g., *United States v. Heck*, 499 F.2d 778 (9th Cir. 1974).

Due Process and Equal Protection

Petitioner also argues that the government denied him due process and equal protection of the laws by not first attempting to resolve the matter administratively under the regulations of the Department of Health and Human Services.

Petitioner also argues that federal courts have jurisdiction over matters only after exhaustion of administrative remedies.

Petitioner's argument is meritless. While individuals aggrieved by agency actions generally may not seek judicial review until after exhausting their administrative remedies, 5 U.S.C. §§ 702, 705, petitioner has not been aggrieved by any action of the Department of Health and Human Services. Rather, petitioner was prosecuted by the United States Attorney's office for a crime. The prosecutor's discretion to bring criminal charges is subject to few challenges, none of which are made here. See *Wayte v. United States*, 470 U.S. 598 (1985).

Insufficient Evidence

Petitioner argues that he acted under the direction of the suppliers and had no fraudulent intent. Petitioner states that he was unaware of the Medicare guidelines and had never contracted with the government to abide by those guidelines. Petitioner concludes that he should not be accountable for any violations of the guidelines.

A petitioner challenging the sufficiency of the evidence supporting his conviction bears a heavy burden. See *United States v. Canady*, 126 F.3d 352, 356 (2d Cir. 1997). The evidence presented at trial is reviewed in the light most favorable to the government, and all inferences are drawn and all issues of credibility are resolved in the prosecution's favor. See *id.* The challenge fails if "any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Furthermore, a "defendant's knowledge of the conspiracy and his participation in it with criminal intent may be established through circumstantial evidence." *United States v. Gordon*, 987 F.2d 902, 906-07 (2d Cir. 1993).

On appeal, petitioner argued that the evidence against him was insufficient. Applying the above standard, the Second Circuit rejected petitioner's insufficiency argument, finding:

Here there was a great volume of circumstantial evidence - including the testimony of the staff of the housing developments and of a dozen residents (none of whom were ever examined by Dr. Ntshona), the preprinted certificates found in Carey Jackson's basement, and the defendants' own post-arrest statements.

United States v. Jackson, No. 95-1632, slip op. (2d Cir. May 23, 1996).

Accordingly, petitioner is procedurally barred from raising his insufficiency of the evidence argument now because questions that were raised and considered on direct appeal may not be relitigated in a Section 2255 petition. See *Cabrera v. United States*, 972 F.2d 23 (2d Cir. 1992); *United States v. Jones*, 918 F.2d 9, 11 (2d Cir. 1990).

In any event, there was sufficient evidence of petitioner's involvement in a conspiracy to defraud Medicare by causing false claims to be submitted. He was not prosecuted for regulatory violations, but for conspiracy to commit fraud. The evidence showed that petitioner conspired with his brother and others to obtain money from the federal Medicare program by

submitting false certificates of medical necessity to two suppliers of durable medical equipment which then submitted the certificates to Medicare for payment.

The impropriety of the certificates did not arise from technical violations of Medicare guidelines or from violations of any agreement or contract between petitioner and the government. Rather, the evidence showed that petitioner falsely and improperly filled out and submitted the certificates. Petitioner placed the names of Medicare beneficiaries on pre-printed certificates, knowing that the events described in the certificates such as a trial period and frequent offices visits had not occurred. As a result of petitioner's conversations with the beneficiaries and the numerous certificates petitioner filed for some beneficiaries, petitioner also knew that the beneficiaries did not have the conditions described in the certificates. Knowing that the equipment had to be authorized by a doctor, petitioner paid Dr. Ntshona to sign the certificates, knowing that Dr. Ntshona had not examined the beneficiary. Petitioner also possessed a piece of paper indicating that someone was practicing forging Dr. Ntshona's signature, thereby eliminating the need to pay Dr. Ntshona.

Accordingly, there was ample evidence to support petitioner's conviction.

Documentary Evidence

Petitioner argues that this court abused its discretion by admitting one of the prosecution's exhibits, obtained from

petitioner's basement, which consisted of a sheet of paper with five signatures that resembled Dr. Ntshona's. Petitioner argues that this court did not appropriately balance the probativeness and prejudice as required by Federal Rule of Evidence 403.

Petitioner also argues that the prosecutor made improper use of the exhibit in her rebuttal. Throughout trial, petitioner argues, the prosecution implied that Dr. Ntshona signed all of the certificates of medical necessity. During rebuttal, the prosecutor referred to the exhibit as follows:

Consider Exhibit 91 in your deliberations. Consider eliminating the middleman with these signatures of Dr. Ntshona. It look like - you decide what it is. It appears to be several copies of what is close to Dr. Ntshona's signature as it appears on the forms. You ask yourself what was Carey Jackson doing on this form, eliminating the middleman, saving a little money?

During deliberations, the jury asked to examine the exhibit as well as various certificates of medical necessity found in petitioner's basement. Petitioner argues that the prosecutor's use of the exhibit in rebuttal raised a new issue, forgery, on which the jury relied to reach a guilty verdict. Petitioner argues that this was improper because he did not have an opportunity to rebut the claim of forgery.

Petitioner's Rule 403 argument was considered and rejected on appeal and cannot be raised again. To the extent that petitioner argues that he was unduly prejudiced by a last minute change in the prosecution's strategy, that argument also fails. During trial, the prosecution consistently contended that Dr. Ntshona did not examine the patients. The exhibit indicating

that someone was practicing Dr. Ntshona's signature is consistent with the prosecution's theory that Dr. Ntshona did not examine the beneficiaries.

Additionally, petitioner was well aware of the use to which the exhibit could be put during the trial and had the opportunity to present evidence to rebut it. Prior to admitting the exhibit, this court commented that the exhibit would "answer the defense that this was done with the cooperation and at the insistence of this Doctor and this is to show that the Doctor was not cooperating and responsible and assisting, but on the contrary, that it was necessary for the defendants to ... practice the signatures, so they could do it without the cooperation of the Doctor."

During cross-examination of Agent Langtry, counsel for petitioner asked Agent Langtry whether Dr. Ntshona signed all of the certificates of medical necessity. Agent Langtry responded that all certificates had a signature on them but that he did not know whether Dr. Ntshona signed all of the certificates. Counsel for petitioner's brother asked Agent Langtry whether the exhibit had been sent to a handwriting expert for comparison with the handwriting exemplars given by petitioner and his brother. It had not, nor had Dr. Ntshona given a handwriting exemplar.

Accordingly, petitioner and his counsel were well aware of the potential use of the exhibit and attempted to develop evidence to combat it. For this reason, this case is readily distinguishable from *Shiddiqi v. United States*, 98 F.3d 1427 (2d

Cir. 1996). In *Shiddiqi*, the prosecution argued, in its opening statement, that Shiddiqi charged Medicare for doing chemotherapy and for the drugs used in the chemotherapy, when in fact the chemotherapy was done at a hospital which also charged Medicare for it. See *id.* at 1428-29. Shiddiqi's defense was that he did not charge Medicare for the actual chemotherapy and drugs but for his supervision of the chemotherapy. See *id.* at 1429. During trial, the prosecution introduced evidence that Shiddiqi was out of the country for some of the sessions Shiddiqi billed to Medicare. To combat this charge, Shiddiqi testified that he still supervised the chemotherapy from abroad by arranging another doctor to supervise and contact him if necessary. See *id.* at 1429-31. Shiddiqi did not introduce corroborating evidence, even though the doctor who supposedly provided the coverage was in the courthouse ready to testify. This did not appear to be an oversight because the prosecution seemed to concede the point, stating on the record that the chemotherapy sessions were covered by another doctor. See *id.* at 1431-32. During the prosecution's closing statement, however, the prosecutor argued that Shiddiqi did not in fact arrange coverage. See *id.* at 1432. Shiddiqi was convicted of Medicare fraud for only those sessions during which he was out of the country.

Shiddiqi filed a petition pursuant to 28 U.S.C. § 2255. The Second Circuit granted the petition, arguing that the shifting theories of the government "materially impeded the effective presentation of a defense during the trial by

misleading defense counsel as to the government's theory of guilt. This enabled the government to obtain a conviction from the jury on a factual theory that was put forth for the first time in summation and had no foundation in fact." *Id.* at 1438.

Unlike Shiddiqi, petitioner knew of the potential use of the exhibit and was convicted on the prosecution's consistent theory that no beneficiary had been examined by Dr. Ntshona. Accordingly, petitioner's analogy fails.

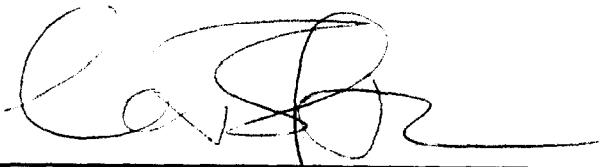
Default Judgment

Petitioner moves for a default judgment. The government was ordered to respond to the petition by March 3, 1997. Prior to that date the prosecution requested additional time to respond. The request was granted. Thereafter, the prosecution requested until April 2, 1997, to respond. This second request was also granted. On April 2, 1997, the prosecution filed its opposition papers. Accordingly, petitioner's motion for a default judgment is denied as is the petition for a writ of habeas corpus.

The Clerk of the Court is directed to furnish a filed copy of the within to all parties.

SO ORDERED.

Dated : Brooklyn, New York
August 12, 1998



United States District Judge